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May 31, 2016

By email to: kathryn.roberts@state.nm.us

Ms. Kathryn Roberts, Director
Resource Protection Division
New Mexico Environment Department
Post Office Box 5469
Santa Fe, New Mexico 87502-5469

Re: Public Comments about the Proposed 2016 LANL Consent Order

Dear Ms. Roberts:

Concerned Citizens for Nuclear Safety (CCNS), a non-governmental organization based in Santa Fe, New Mexico, and Robert H. Gilkeson, an independent registered geologist, urge the New Mexico Environment Department (NMED) to withdraw the proposed 2016 Compliance Order on Consent, or Consent Order, for Los Alamos National Laboratory (LANL). NMED released the proposed 2016 COC for a 45-day public comment period on March 30, 2016. On May 13, 2016, NMED extended the comment period for 15 days to May 31, 2016.

The proposed Consent Order creates serious problems to ensuring cleanup: it limits public participation opportunities; it reduces enforceability by the Environment Department; it puts the Department of Energy (DOE) in the role of regulator; it does not protect surface water, ground water and drinking water; it creates loopholes; and it does not have a final compliance/completion date. The proposed 2016 Consent Order represents a giant step backwards to achieving genuine cleanup at LANL.

In addition, at the request of the Department of Energy (DOE) and Los Alamos National Security, LLC (LANS), the management contractor at LANL, (collectively the Respondents) the NMED has issued over 150 extension of time under the existing 2005 Consent Order. Some of the extensions have been renewed two or three times to the detriment of actual cleanup work being done. We ask: How and when will cleanup ever get done at LANL?

The Environment Department must retain the existing Consent Order that went into effect on March 1, 2005, with a final deadline of December 6, 2015 – that was not met for a variety of reasons, including NMED granting over 150 extensions of time.

Section XII of the 2005 Consent Order established dozens of mandatory deadlines for the completion of corrective action cleanup tasks, including completion of investigations at individual sites, installation of groundwater monitoring wells, submittal of groundwater monitoring reports, evaluation of remedial alternatives for individual sites, and completion of final cleanup remedies. These deadlines are enforceable under Section III.G of the 2005 Consent Order.

CCNS and Gilkeson urge the Environment Department to conserve taxpayer resources and withdraw the proposed 2016 Consent Order. The Environment Department could effectively modify the 2005 Consent Order with an update of the Section XII cleanup schedules and a realistic final compliance/completion date that would lead to cleanup. Changing the final compliance/completion date is a major Class 3 permit modification request requiring the opportunity for a public hearing with direct testimony and cross-examination. 40 CFR §270.42, Appendix I.A.5.b

Request for a Public Hearing

CCNS and Gilkeson request that NMED hold a public hearing on a revised Section XII cleanup schedules and new final compliance/completion date as required by the 2005 Consent Order, the New Mexico Hazardous Waste Act (NMSA 1978, §§ 74-4-1 to 14) and the federal Resource Conservation and Recovery Act (RCRA) (40 CFR §270.42, Appendix I.A.5.b.). In the alternative, CCNS and Gilkeson request that NMED hold a public hearing on a proposed 2016 Consent Order. Id.

In order to address significant and outstanding issues stated in our comments, however, CCNS and Gilkeson request that a public hearing be scheduled. CCNS and Gilkeson are hopeful that our concerns may be resolved in advance of a public hearing, and, if successful, will immediately withdraw the hearing request.

The Commenters

Concerned Citizens for Nuclear Safety (CCNS) is a non-governmental organization based in Santa Fe, New Mexico. CCNS formed in 1988 to address community concerns about the proposed transportation of radioactive and hazardous waste from LANL to the then proposed Waste Isolation Pilot Plant (WIPP). For the past 28 years, CCNS and our members who reside downwind and downstream of LANL have actively participated in NMED administrative permitting processes involving LANL initiated by the Hazardous Waste Bureau, Air Quality Bureau, Surface Water Quality Bureau and Ground Water Quality Bureau.

Robert H. Gilkeson is an independent registered geologist and former contractor at LANL. His work included managing the installation of ground water wells under the NMED ordered 1995 Hydrogeologic Workplan. Mr. Gilkeson also wrote and contributed to many of the RCRA Facility Investigation reports for the LANL dumps that are the subjects of both the 2005 and proposed 2016 COC.

CCNS and Gilkeson have been working together since 2004 to address LANL ground water and cleanup issues. Our experience addressing LANL cleanup issues uniquely qualifies us to

participate formally in a public hearing about updating the 2005 COC or the proposed 2016 COC.

**CCNS and Gilkeson Ask: Is the proposed 2016 Compliance Order on Consent (COC) a modification and/or a revocation and reissuance of the 2005 COC?
In the alternative, what loopholes are being created for DOE and LANS through the proposed 2016 COC?**

It is unclear what regulatory authority the Environment Department is using to issue the proposed 2016 Compliance Order on Consent (COC) for public review and comment. Is the proposed 2016 COC

1. A modification of the 2005 COC? or
2. A revocation and reissuance of the 2005 COC?

To support our concerns about what type of document the proposed 2016 COC is, just look at the first page. It does not contain a proper administrative pleading heading. It appears to be an agreement rather than an administrative order.

It is unclear whether the NMED Secretary received information to cause a modification, or revocation and reissuance, or if both conditions exist. 40 CFR § 270.41. Neither the Public Notice No. 16-04, nor the proposed 2016 COC, provide the necessary information.

Nevertheless, Sec. II *Purpose and Scope of Consent Order* of the proposed 2016 COC, states: "This Consent Order supersedes the 2005 Compliance Order on Consent..." "Supersede" means "to take the place of, replace or supplement."

If the proposed 2016 COC is a revocation, then 40 CFR §270.41 applies. See 40 CFR §124.5(c)(2)) ("When a permit is revoked and reissued under this section, the entire permit is reopened just as if the permit had expired and was being reissued").

Further, "If cause does not exist under this section, the [NMED Secretary] shall **not** modify or revoke and reissue the permit, except on the request of the Permittee." [Emphasis added.] 40 CFR §270.41.

Further, it is unclear whether DOE (the Respondent in the proposed 2016 COC) and Los Alamos National Security, LLC (LANS) (collectively, DOE and LANS' predecessor (the University of California) are the Respondents in the 2005 Consent Order) requested the revocation and reissuance of the 2005 COC. If Respondent did, what is the date of their request? Was the request posted to LANL's Electronic Public Reading Room? How was the public notified of the request?

The question remains open: What entity initiated the process to create the proposed 2016 COC? This question must be answered before any public hearing is held on this matter.

If the proposed 2016 COC is a modification of the 2005 COC, then 40 CFR §270.42, Appendix. I, A.5.b "Schedule of compliance: (b) Extension of final compliance date" applies. In this case, the rules for a Class 3 permit modification apply. 40 CFR §270.42(c).

As far as we understand, the Respondent DOE did not submit a Class 3 permit modification request. Id. If the Respondent DOE did submit a Class 3 permit modification request to the NMED Secretary, the Public Notice No. 16-04 would have reflected that fact. It does not.

If it is a Class 3 permit modification, the NMED Secretary should deny the request because the condition of the modification fail to protect human health and the environment.

NMED has not clearly provided the necessary information about the regulatory authority it is using to issue the Public Notice No. 16-04 to begin the public review and comment of the proposed 2016 COC. NMED must, therefore, retract the proposed 2016 COC, clarify their authority to issue the document and resubmit it for at least a 60-day public comment period.

General Comments

The following general comments support the CCNS and Gilkeson position that NMED should withdraw the proposed 2016 Consent Order and revise the 2005 Consent Order to update the Section XII cleanup schedules and provide a realistic final compliance/completion date.

DOE is in the process of hiring a new cleanup contractor for LANL and recently issued a Request For Proposals (RFP), which states:

The total estimated value of the contract is approximately \$1.7B [billion] over the prospective ten-year period of performance, including option periods.

The ten-year contract amount of \$1.7 billion would average to \$170 million per year, well below the current proposed budget of \$189 million for Fiscal Year 2017 (which begins October 1, 2016). Before a contract is even signed, the proposed 2016 Consent Order fails to increase the LANL cleanup budget. The new cleanup contract is inadequate and is set up to fail under either the 2005 Consent Order or a proposed 2016 Consent Order.

Further, there is no mechanism in the proposed 2016 Consent Order to increase, or to even maintain, a stable annual cleanup budget.

NMED Must Add Los Alamos National Security, LLC (LANS), the Management Contractor at LANL, as a Party

The proposed 2016 draft Consent Order omits naming the management contractor at LANL, the Los Alamos National Security, LLC (LANS), a limited liability corporation, as a Party to the Order. The management contractor must be a party to the Consent Order.

NMED, DOE and LANS Propose to Eliminate the Public's Due Process Rights in the proposed 2016 Consent Order

The 2005 Consent Order explicitly protects procedural due process rights available to the public under the hazardous waste laws. The proposed 2016 Consent Order explicitly removes these protections. For example, Section VII.G states:

The Parties [NMED and DOE] agree that the rights, procedures and other protections set forth at 20.4.1.900 NMAC (incorporating 40 C.F.R. § 270.42), 20.4.1.901 NMAC, and 20.4.1.902 NMAC, including, but not limited to, opportunities for public participation, including public notice and comment, administrative hearings, and judicial appeals, *do not apply* to modification of the Consent Order itself. [Emphasis added.]

Thus, as proposed in the above language, the Parties have inappropriately agreed to remove the due process rights, procedures and other protections provided to the public under RCRA, the New Mexico Hazardous Waste Act and the 2005 Consent Order. This provision must be stripped from the proposed 2016 Consent Order.

NMED Must Provide the Public with the Opportunity to Comment on All Drafts of the proposed 2016 Consent Order

In 2002, NMED released a draft Consent Order for public review and comment. Following the 18 months of closed door negotiations between NMED, DOE, the University of California (the predecessor of LANS), and the New Mexico Attorney General, a final 2004 draft Consent Order was released for public comment. NMED should follow the applicable federal and state regulations and established precedent to provide for public review and comment for all future drafts of the proposed 2016 draft Consent Order. 40 CFR 270.42(c)(6).

The Environment Department Must Respond in Writing to All Public Comments

The Environment Department must reply individually to each and every comment submitted by the public and DOE and LANS.

NMED must require that all DOE, LANS and public comments and NMED's response those comments be made public through LANL's Electronic Public Reading Room at <http://epr.lanl.gov/oppie/service>.

All Documents Must Be Posted to LANL's Electronic Public Reading Room

The Environment Department, DOE and LANS must make all communications between them, including all documents, submittals, approvals, notices of deficiencies and denials submitted as required by the 2005 Consent Order or a proposed 2016 Consent Order readily and electronically available to the public through LANL's Electronic Public Reading Room at <http://epr.lanl.gov/oppie/service>.

DOE and LANS must notify individuals by e-mail of all submittals to the Electronic Public Reading Room.

NMED Must Update the Public about the Current State of Cleanup Activities under the 2005 Consent Order

NMED must promptly provide the public with a detailed document about the current status of every site listed in the 2005 Consent Order, including a scheduled completion date or verification that the cleanup work has been completed.

All documents submitted by DOE and LANS, or their predecessors, under the 2005 Consent Order, along with NMED's response, must be incorporated by reference into a proposed 2016 Consent Order.

All Cleanup Work Must Have Enforceable Deadlines; The Cleanup Schedule Must Drive Funding, Not as Proposed with Funding Driving Cleanup

The proposed 2016 Consent Order eliminates all the deadlines for completing cleanup as required by the 2005 Consent Order. It replaces the deadlines with an open-ended and vague scheduling process, with limited enforcement opportunities.

The proposed 2016 Consent Order proposes a "campaign" approach with limited enforceable cleanup deadlines for work scheduled only for that year, thereby ensuring that the campaign approach would be open-ended without a final compliance/completion date.

Campaign deadlines would be negotiated each year through a closed "Annual Planning Process" between NMED, DOE and LANS with no public participation, no opportunity to comment on the proposed deadlines, nor a required public hearing. The Annual Planning Process must be opened up to public participation, opportunity for comment, and opportunity for a public hearing.

The proposed 2016 Consent Order's annual schedule would be left to DOE's discretion. The 2005 Consent Order's fundamental approach is that the schedule drives the funding appropriated by Congress – not the funding driving the schedule as required in the proposed 2016 Consent Order.

Any Consent Order must ensure that all scheduled cleanup work has mandatory completion dates, which must be enforced by NMED.

The Consent Order Cannot Be Open-Ended

The proposed 2016 Consent Order would indefinitely extend the final compliance date for completing corrective cleanup action at LANL, without the opportunity for a public hearing with formal testimony and cross-examination of witnesses.

Any Consent Order for LANL cleanup must have a final compliance/completion date to which NMED, DOE and LANS agree to and are so bound.

NMED must provide a 60-day public review and comment period, in addition to an opportunity for a public hearing, about schedule changes to Section XII in the 2005 Consent Order and the new final compliance date as required by state and federal regulations. See 40 CFR §270.42, Appendix I.A.5.b.

NMED Must Not Give DOE and LANS a "Get Out of Jail Free" Card - Existing Violations Must Not Be Waived

Section II.A of the proposed 2016 Consent Order states,

This Consent Order supersedes the 2005 [Consent] Order and settles any outstanding alleged violations under the 2005 Consent Order.

This is a “get out of jail free” card for DOE and LANS.

Knowing that this provision may be available to them, DOE and LANS may encourage NMED to investigate “alleged violations” so that, if and when a new Consent Order is issued, DOE and LANS might have immunity from alleged violations under the 2005 Consent Order.

The Environment Department is abdicating its responsibility to protect human health and the environment as required by the federal RCRA and the New Mexico Hazardous Waste Act.

NMED must not surrender its regulatory and enforcement powers.

New Mexico Attorney General Approval Must Be Obtained

The 2005 Consent Order was signed by the Attorney General of New Mexico for purposes of the Section III *Covenant Not to Sue* and the *Reservation of Rights* provisions.

The proposed 2016 Consent Order provides the State of New Mexico with a covenant not to sue DOE on behalf of the State of New Mexico, not merely on behalf of the Environment Department. Nevertheless, there is no signature line for the New Mexico Attorney General in the proposed 2016 Consent Order.

The Attorney General was an active participant, representing the People of New Mexico, in the 2005 Consent Order administrative process. The Environment Department must ensure that the New Mexico Attorney General is consulted, and his approval obtained, before any Consent Order is finalized.

Cleanup Levels Must Remain Strict

Section IX *Cleanup Objectives and Cleanup Levels* of the proposed 2016 Consent Order would allow DOE to “develop site specific ecological cleanup levels” to mitigate unacceptable ecological risk due to release of site-related contaminants.

We note CCNS’s recent comments about the flawed ecorisk documents DOE and LANS submitted to NMED. Our questions required NMED to go back and request additional information from DOE and LANS, resulting in a more protective change to the ecorisk assessment.

There is no mention of NMED’s role in this process. DOE and LANS would be allowed to demonstrate to NMED that any particular “cleanup objective is impracticable.”

The unacceptable criteria for DOE and LANS to determine whether a cleanup is “impracticable” include technical difficulty, the cost of the project, hazards to workers or to the public, and any other basis that may support a finding of impracticability.

If NMED approves the impracticability request, DOE and LANS may then propose alternative cleanup methods using site-specific risk assessments. All of the decision-making could take place behind closed doors, as there are no public participation requirements in this section.

NMED must specify the applicable cleanup levels that will be used and when and where they will be applied.

New Mexico Deserves Better

In closing, the New Mexico Environment Department's proposed 2016 Consent Order allows the federal government to leave Northern New Mexico contaminated forever if DOE and its management contractor, in this case, LANS, believes that cleanup is too difficult or costly- a sorry situation indeed for a nuclear weapons facility that receives over \$2 billion in taxpayer money a year.

For all the reasons stated above, and because NMED has not provided the necessary authority for issuing the proposed 2016 COC, CCNS and Gilkeson urge the New Mexico Environment Department to withdraw the proposed 2016 COC.

The New Mexico Environment Department should implement revisions to the 2005 Consent Order in Section XII for cleanup schedules and include a final compliance/completion date. The schedules and final date should be realistic, aggressive and enforceable.

The State of New Mexico must remain in the driver's seat. NMED should not abdicate its power to DOE and LANS at LANL. Cleanup of LANL is essential to protect human health and the environment. Cleanup would permanently protect the environment and our precious water resources while creating hundreds of high-paying cleanup jobs. It would be a real win-win for New Mexicans.

Please contact us with any questions or concerns.

Sincerely,

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